THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0005

BETWEEN:

SONERA HOLDING B.V.

Appellant

and

CUKUROVA HOLDING A.S.

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Ben Valentin with Mr. John Carrington, QC for the Appellant
Mr. Kenneth MacLean, QC with Ms. Arabella di Iorio and Mr. David Caplan for the Respondent

2015: July 17;
2016: June 23.

Interlocutory appeal – Arbitration – Anti-arbitration injunction – Foreign arbitral proceedings – Arbitration Act, 2013 – Interpretation of s. 3(2)(b) of Arbitration Act, 2013 – Whether court has jurisdiction under Arbitration Act, 2013 to grant anti-arbitration injunction so as to restrain party from pursuing foreign arbitral proceedings – If so, whether such injunction ought to be granted in present proceedings to restrain respondent from pursuing foreign arbitral proceedings – Whether learned judge erred in interpreting s. 3(2)(b) of Arbitration Act, 2013 – Whether learned judge erred in dismissing appellant's application for anti-arbitration injunction as a result of his interpretation of s. 3(2)(b)

An ex parte order made by the court on 24th October 2011 ("the Enforcement Judgment") permitted the appellant, Sonera Holding B.V. ("Sonera") to enforce an ICC arbitration award made in Geneva on 1st September 2011 ("the Final Award") in the same manner as a judgment of the High Court in the BVI. The respondent, Cukurova Holding A.S. ("CH") applied to set aside the Enforcement Judgment. Their application was brought on various grounds, one of these being that the First Tribunal had acted in excess of jurisdiction in making the Final Award and awarding damages because it had been constituted under an

arbitration clause contained in a letter agreement ("the Letter Agreement") but the First Tribunal had granted remedies for breach of a different agreement – a share purchase agreement ("SPA") – which it determined had been concluded between the parties and which SPA contained its own arbitration clause. CH argued this point before the First Tribunal, the High Court of the Virgin Islands, the Court of Appeal and finally, the Privy Council and it was rejected by them all. Accordingly, the Final Award remains in full force. CH then brought revision proceedings before the Swiss Federal Supreme Court, aimed at reopening the First Tribunal proceedings, but these were dismissed on 30th April 2012. By then, CH had commenced arbitral proceedings under the arbitration clause in the SPA ("the SPA Arbitration") before a second arbitration tribunal ("the Second Tribunal"), seeking the following: (i) a declaration that CH had never entered into the SPA in any form; and (ii) compensation against Sonera in equal amount as the Final Award in favour of Sonera made against CH (plus costs). Sonera raised preliminary objections before the Second Tribunal, arguing that CH's claims should be dismissed as an abuse of process and because: as a matter of Swiss law (which was the governing law for both arbitrations) there was an identity of parties and subject matter between the arbitration which took place before the First Tribunal ("the Letter Agreement Arbitration") and the SPA Arbitration, sufficient to operate as an estoppel per rem judicatam which precluded the grant of relief sought by CH; and (ii) that a proper application of the kompetenz-kompetenz principle meant that the Second Tribunal had no jurisdiction to review the decision of the First Tribunal as to its own jurisdiction. This was something which could only be done by the Swiss Federal Supreme Court or a court asked to enforce the First Tribunal's awards under Article V of the New York Convention.

The Second Tribunal conducted a hearing on the preliminary objections during the course of which Sonera accepted that the Second Tribunal had jurisdiction over the disputes arising out of the SPA and also, that it was competent to determine its own jurisdiction. On 12th May 2014, the Second Tribunal issued a partial award, holding that it was not bound to 'recognise' those parts of the First Tribunal's series of awards which it felt had 'trespassed' upon matters properly falling within the arbitration clause under the SPA, such as CH's obligation to transfer the shares or otherwise pay damages for failure to do so. The Second Tribunal reasoned that there could be no estoppel arising out of those parts of the First Tribunal's awards that it could not recognise. This resulted in the Second Tribunal directing that the SPA Arbitration proceed to a determination on the merits of CH's claims. The Second Tribunal held, however, that it could recognise those parts of the First Tribunal's awards which concluded that the parties had reached agreement on the terms of the SPA and that CH was in breach of its obligation under the Letter Agreement to execute and deliver a final SPA and thus, it was estopped from making a determination on these issues.

In compliance with a procedural order made by the Second Tribunal, CH produced and filed its statement of claim. It then became apparent that CH was seeking not merely an equal and opposite award to the Final Award to, in effect, cancel it out, but it also sought orders restraining Sonera from relying on the Enforcement Judgment and further ordering Sonera to 'unwind' the charging order which was granted and made final by the BVI court on 4th November 2014 (which order was not appealed) by way of enforcing the Enforcement Judgment. Sonera, finding that CH's new claims amounted to a serious

collateral attack against the Enforcement Judgment, filed an application on 27th October 2014 for an anti-arbitration injunction. By the time this application had been made, the BVI had brought into force the Arbitration Act, 2013[1] ("the Act") which repealed the 1976 Arbitration Act.[2] The learned judge who heard Sonera's application held that based on his construction of the provisions of the Act, the court could no longer interfere in ongoing arbitral proceedings by the grant of an injunction. In arriving at this conclusion, the judge placed reliance mainly on section 3(2)(b) of the Act which states that: 'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'. The learned judge accordingly dismissed Sonera's application for the anti-arbitration injunction. Sonera appealed the decision, contending that the learned judge erred in his interpretation of the relevant sections of the Act as the court had and continues to have jurisdiction to grant the injunctive relief which it was seeking – the Arbitration Act, 2013 has in no way affected the general power of the court to grant injunctions as provided in section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act[3] ("the Supreme Court Act"). Moreover, the court ought to have exercised the jurisdiction and granted an injunction restraining CH from pursuing the proceedings before the Second Tribunal. CH opposed the appeal, arguing that the learned judge was right to hold that the Arbitration Act, 2013 had removed the court's jurisdiction to grant the anti-arbitration injunction, and even if it had the jurisdiction (which it does not accept that it has), the court ought not to exercise its discretion in favour of granting such an injunction.

Held: allowing the appeal and ordering that CH be restrained from causing or seeking to cause the Second Tribunal from granting any relief which would have the effect (or the potential effect) of: (i) preventing Sonera from enforcing the Enforcement Judgment issued on 24th October 2011 or the final charging order issued on 4th November 2014; or (ii) requiring Sonera to discharge, reverse or unwind the BVI court orders; that:

1. The learned judge erred in holding that section 3(2)(b) of the recently enacted Arbitration Act, 2013 took away the court's jurisdiction to grant injunctive relief as provided under section 24 of the Supreme Court Act. The Court retains its general power and jurisdiction pursuant to section 24 of the Supreme Court Act to grant such relief. This power is wholly independent of the provisions of the Arbitration Act, 2013. Had it been intended that section 3(2)(b) would oust the court's jurisdiction to grant injunctions in relation to arbitral proceedings provided under section 24 of the Supreme Court Act, this would have been clearly stated in section 3(2)(b) itself.

2. Section 3(2)(b) of the Act does no more than state the policy as to how arbitrations are to be viewed and governed in the Virgin Islands, with a clear prohibition or warning to the court in the seat of the arbitration not to interfere in an arbitration. This warning to the court contained in section 3(2)(b) as a guiding principle informs the court's approach to an arbitration, be it domestic or foreign. A clear distinction should be drawn, however, between interference with an arbitration on the one

[1] Act No. 13 of 2013, Laws of the Virgin Islands.
[2] Cap. 6, Revised Laws of the Virgin Islands 1991.
[3] Cap. 80, Revised Laws of the Virgin Islands 1991.

hand, and restraining a party who may be using, be it an arbitral process or a court process, in a manner which may be said to be vexatious, or oppressive and abusive of the court's own process, on the other hand. The equitable remedy of an injunction was developed by the courts of equity to relieve, among things, against unconscionable conduct, or conduct aimed at undermining the court's lawful processes. Further, the power of the court expressed in section 24 of the Supreme Court Act to grant injunctions in circumstances as the court deems just and convenient, is a power expressed in the broadest terms and a power which must remain flexible, as what justice may require, will vary from case to case.

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC[4] [2013] 1 WLR 1889 applied.

3. The seeking of an award by CH in an amount equal to the Final Award may not necessarily or inherently be considered as being subversive of the Enforcement Judgment. However, CH seeking, by way of relief (as expressly set out for the first time by CH in its statement of claim in September 2014), orders directly aimed at unwinding the Enforcement Judgment and the orders made by way of enforcement thereof, is a completely different matter altogether. These specific remedies expressed by CH do not plainly follow from the Request for Arbitration commenced in 2012. The heads of relief sought by CH are aimed directly at the Enforcement Judgment – a judgment of the court which is in every respect final – and the enforcement orders pursuant to that judgment. Such relief, if granted by the Second Tribunal, would be plainly subversive of the court's judgment and a direct interference with this Court's processes in the exercise of its enforcement jurisdiction recognised by the New York Convention in respect of the Final Award, which is a Convention award. The effect would be to all intents and purposes not simply an outflanking of the court's judgment but a nullification of it. This course, signaled by CH in its statement of claim ought not to be permitted as it cuts across the enforcement regime established by the Convention itself.

Turner v Grovit and Others [2002] 1 WLR 107 applied; Masri v Consolidated Contractors International (UK) Ltd and Others (No. 3) [2009] QB 503 applied.

JUDGMENT

[1] PEREIRA, CJ: This appeal is yet another battle in the legal wars between the appellant ("Sonera") and the respondent ("CH"). It raises two main issues, namely:

[4] [2013] 1 WLR 1889.

(a) Whether the court has jurisdiction to grant an anti-arbitration injunction so as to restrain a party from pursuing a foreign arbitration, and if so;

(b) Whether such an injunction ought to be granted.

A determination of the first issue in the negative would render the second issue otiose.

The Background

[2] A summary of the factual background, so far as is relevant to this appeal, may helpfully be extracted from the judgment below from which this appeal arises. A more detailed background is set out in the decision of the Privy Council in Cukurova Holding A.S v Sonera Holding B.V.[5]

(a) On 24th October 2011, the court below made an order ex parte permitting Sonera to enforce an ICC arbitration award made in Geneva on 1st September 2011 ("the Final Award") by an arbitration tribunal ("the First Tribunal") in the same manner as a judgment of the High Court ("the Enforcement Judgment").

(b) On 25th November 2011, CH applied to set aside the Enforcement Judgment on various grounds, one of which was that the First Tribunal in making the Final Award and awarding damages, acted in excess of jurisdiction because it had been constituted under an arbitration clause contained in a letter agreement ("the Letter Agreement") but that remedies were granted for breach of a different agreement, namely a share purchase agreement ("SPA") which it determined had been concluded between the parties and which SPA contained its own arbitration clause. This argument had been run before the First Tribunal, the High Court of the Virgin Islands, the Court Appeal and

[5] [2014] UKPC 15.

finally the Privy Council and rejected by all. The Enforcement Judgment on the Final Award accordingly remains in full force.

(c) On 23rd December 2011, CH brought revision proceedings before the Swiss Federal Supreme Court aimed at reopening the First Tribunal proceedings based, it said, on fresh evidence after the making of the Final Award. Those proceedings were dismissed on 30th April 2012. By then, CH had started arbitration proceedings under the arbitration clause in the SPA ("the SPA Arbitration") before a second arbitration tribunal ("the Second Tribunal") seeking: (i) a declaration that CH never entered into the SPA in any form; and (ii) compensation against Sonera in equal amount as the Final Award in favour of Sonera made against CH (plus costs).

(d) Sonera raised objections before the Second Tribunal and argued before the Second Tribunal that CH's claims should be dismissed as an abuse of process and also because: (i) as a matter of Swiss law[6] there was an identity of parties and subject matter between the arbitration which took place before the First Tribunal ("the Letter Agreement Arbitration") and the SPA Arbitration sufficient to operate as an estoppel per rem judicatam which precluded the grant of relief sought by CH; and (ii) that a proper application of the kompetenz-kompetenz principle meant that the Second Tribunal had no jurisdiction to review the decision of the First Tribunal as to its own jurisdiction – something which could only be done by the Swiss Federal Supreme Court or a court asked to enforce the First Tribunal's awards under Article V of the New York Convention.

(e) On 7th May 2013 the Second Tribunal conducted a hearing on these preliminary objections in the course of which Sonera accepted that the Second Tribunal had jurisdiction over the disputes arising out of the

[6] The law governing both arbitrations.

SPA and that the Second Tribunal was competent to determine its own jurisdiction.

(f) On 12th May 2014 the Second Tribunal issued a Partial Award in which it held that it was not bound to 'recognise' those parts of the First Tribunal's series of awards which it felt had 'trespassed' upon matters properly falling within the arbitration clause under the SPA, such as CH's obligation to transfer the shares or otherwise pay damages for failure to do so. As the Second Tribunal considered that it could not recognise those parts of the First Tribunal's awards, it reasoned that there could be no estoppel arising out of them. The result was that the Second Tribunal directed the SPA Arbitration to proceed to a determination on the merits of CH's claims.

(g) The Second Tribunal, however, held that it could recognise those parts of the First Tribunal's awards (and was thus estopped), which concluded that the parties had reached agreement on the terms of the SPA and that CH was in breach of its obligation under the Letter Agreement to execute and deliver a final SPA which one would have thought leads, for all practical purposes, to the same end result as the Final Award.

(h) The Second Tribunal does not say that the Final Award is a nullity, nor could it, having regard to the kompetenz-kompentenz principle.

(i) The full import and thrust of CH's case was brought to the fore when, on 19th September 2014, CH, in compliance with a procedural order made by the Second Tribunal, produced its statement of claim. That statement of claim then specifically disclosed for the first time CH's intention to seek from the Second Tribunal not merely an equal and opposite award to, in effect, cancel out the Final Award, but also, orders

restraining Sonera from relying on the Enforcement Judgment and further ordering Sonera to 'unwind' the charging order which was granted and made final by the BVI Court on 4th November 2014 (not appealed) by way of enforcing the Enforcement Judgment.

(j) This disclosure, Sonera says, caused it to become alarmed because the new claims amounted to a serious collateral attack against the Enforcement Judgment, which is no longer impeachable and this is what caused it to spring into action by the filing of an application on 27th October 2014 for an anti-arbitration injunction.

(l) It bears noting that by the time Sonera made its application for the anti-arbitration injunction, the Virgin Islands had brought into force, on 1st October 2014, the Arbitration Act, 2013[7] which repealed the 1976 Arbitration Act.[8]

(m) After the filing of full submissions and evidence on both sides, the learned judge heard the anti-arbitration application, and delivered judgment on 12th February 2015 in which he held essentially, that the Arbitration Act, 2013 (on his construction of the provisions therein) had taken away the court's jurisdiction to interfere by the grant of an injunction.[9] On this basis he felt constrained to dismiss Sonera's application, although he expressed the view that the SPA Arbitration was plainly 'inherently subversive of the judgment [the Enforcement Judgment]'[10].

[7] Act No. 13 of 2013, Laws of the Virgin Islands.
[8] Cap. 6, Revised Laws of the Virgin Islands 1991.
[9] See: paras. 24-25 of his judgment.
[10] See: para. 35 of the learned judge's judgment.

The Appeal

[3] Put simply, Sonera says that:

(i) the learned judge got it wrong on his interpretation of the Arbitration Act, 2013 as the court had and continues to have jurisdiction to grant the injunctive relief sought; that the Arbitration Act, 2013 has in no way affected the general power of the court to grant injunctions as provided in section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act[11] ("the Supreme Court Act"). This shall be referred to as "the jurisdiction point"; and

(ii) that the court ought to have exercised the jurisdiction and granted an injunction restraining CH from pursuing the proceedings before the Second Tribunal because: (a) CH's pursuit of the relief it seeks in the proceedings before the Second Tribunal threatens to violate Sonera's legal rights arising under the Final Award made by the First Tribunal; and (b) its conduct seeks directly to interfere with the due process, decisions and orders of the court and is therefore vexatious, oppressive and/or unconscionable. In essence, it says that these circumstances afford good bases, well established by judicial authority for the exercise of the power. This shall be coined the "the discretion point".

[4] There is no cross-appeal, but CH strenuously opposes the appeal. It says primarily that the learned judge was right to hold, as urged by it in their arguments below, that the Arbitration Act, 2013 has removed the court's jurisdiction. It further argues however, that even if the court had jurisdiction (which it does not accept that it has), the court ought not to exercise its discretion in favor of granting such an injunction because:

(i) Sonera is guilty of inordinate and inexcusable delay ("the delay argument");

[11] Cap 80, Revised Laws of the Virgin Islands 1991.

(ii) Sonera has participated in the SPA Arbitration and has expressly affirmed the Second Tribunal's jurisdiction;

(iii) Sonera's application represents an illegitimate second bite at the cherry;

(iv) The SPA Arbitration is not interfering with any proceedings or judgment in this jurisdiction; and

(v) It would be contrary to principle for this court to enjoin foreign arbitral proceedings.

The Jurisdiction Point

[5] Logically, in similar manner as the learned judge, it is convenient to deal with the jurisdiction point first as it is only on arriving at an affirmative answer to this question does one get to the exercise of the discretion which would bring into play the five factors on which CH relies as to why the discretion ought not to be exercised in favour of granting relief.

[6] The jurisdiction of the court to grant injunctions where the justice of the case so requires in the exercise of its equitable jurisdiction is so well established that no treatise as to its source need be given, save to say that it is a remedy developed by the courts of equity for the purpose of relieving against a wrong where no remedy at law would be effective for righting it. Section 24(1)[12] of the Supreme Court Act merely provides that the court is also empowered to grant interim injunctive relief 'in all cases in which it appears to the Court or Judge to be just or convenient'. This is a discretionary power expressed in the widest of terms and for good reason as the concept of what is just and convenient must remain relevant and adaptable to changing times and new challenges which the courts may be

[12] s. 24(1) of Supreme Court Act states as follows:
"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.

called upon to address. In large measure, the principles on which a court may grant anti-suit injunctions, and in similar respect anti-arbitration injunctions, are fairly well settled. Much depends on the circumstances. Therefore, whether or not such relief should be granted falls to be considered on a case by case basis. It is not an understatement to say that the circumstances of this case, based on the factual background, may fairly be described as most unusual and in some respects quite novel. This is the first case coming before the court which calls into question the scope of the Arbitration Act, 2013 and the extent to which it may be said to have whittled down or removed altogether a jurisdiction formerly enjoyed by the court. This brings me to a consideration of the provisions and scheme of the Arbitration Act, 2013.

The Arbitration Act, 2013 ("the Act")

[7] The Act incorporates much of the UNCITRAL Model Law. The relevant provisions of the Act for the purposes of this discussion are set out below. However, the principal bone of contention between the parties is the meaning to be given, or, put more accurately, the intended scope of section 3, in particular, section 3(2)(b) of the Act. It is common ground that the SPA Arbitration is a foreign arbitration for the purposes of the Act as it is an arbitration taking place outside the Virgin Islands, to wit, in Geneva.

[8] Section 3 of the Act sets out the following as its objects and founding principles:

> "(1) The object of this Act is to facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense.
> (2) This Act is founded on the following principles:
> (a) subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved;
> (b) the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act; and
> (c) where the Court interferes in the arbitration pursuant to the expressed provisions of this Act it shall, as far as possible,

give due regard to the wishes of the parties and the provisions of the arbitration agreement." (Emphasis added).

[9] Section 6 of the Act is then in these terms:

> "(1) This section has effect in substitution of article 1 of the UNCITRAL Model Law.
> (2) Subject to subsection (3), this Act applies to an arbitration under an arbitration agreement, whether or not the arbitration agreement is entered into in the Virgin Islands, if the place of arbitration is in the Virgin Islands.
> (3) Where the place of arbitration is outside the Virgin Islands, only sections 18, 19, 43, 58, and 59 and Part X apply to the arbitration." (Emphasis added).

[10] Additionally, it is necessary to set out section 10 of the Act on which CH also places reliance:

> "Article 5 of the UNCITRAL Model Law, the text of which is reproduced below, has effect:
>
> *"Article 5. Extent of court intervention*
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law."

The learned judge's reasoning

[11] The learned judge concluded[13] that section 3(2)(b) of the Act was clear. He opined as follows:

> "[15] … Unless the Act expressly provides for the Court to 'interfere' in an arbitration, it must not do so. 'Interference' obviously includes ordering a party to an arbitration to cease participating in it. No distinction is drawn in section 3 of the Act between domestic and foreign arbitrations. I can say at once that there is nothing in the Act expressly providing that the Court may enjoin a party to arbitral proceedings from continuing with them ….
>
> …

[13] At paras. 15-22.

"[20] … [S]ection 3 is dealing with policy. It is very difficult to imagine that the legislature envisaged that the policy of the Virgin Islands would fluctuate on a matter like non-interference in the processes of arbitrations depending upon where the arbitration had its seat. It would be even more unexpected to find that its policy was against interference in domestic arbitrations, but to have no objection to interference in foreign ones, which is the result that Mr Valentin's reading of section 6(3) would produce.

"[21] ... [S]ection 3(2)(b) is … unaffected … by the operation of section 6(3).

"[22] It does, however, follow from this analysis, that section 10 itself has no application in relation to an arbitration with a foreign seat. Why this particular provision was not expressly extended to the case of foreign arbitrations is unclear, but for the reasons given above that does not detract from the overriding nature of the prohibition contained in section 3(2)(b)."

Sonera's arguments

[12] Sonera contends that the learned judge erred in his interpretation of section 3(2)(b) of the Act and as a result, wrongly concluded that the court had no jurisdiction to make the order sought and puts forward the following arguments in support:

(i) Firstly, that since the court's general power to grant injunctive relief is derived from section 24(1) of the Supreme Court Act, it would require clear wording in the Act and express reference to section 24 itself to remove the power therein given. However, the Act makes no reference whatsoever to the Supreme Court Act.

(ii) Secondly, that save for a few narrow exceptions (which are expressly made applicable to foreign arbitrations), the Act is not concerned with foreign arbitrations; that it provides 'a complete arbitral code for the Virgin Islands' and that most of its provisions are 'incapable of having extra territorial effect'.[14] Accordingly, Sonera says, this does not support the learned

[14] per Bannister J at paras. 21 and 17 of his judgment.

judge's conclusion that the policy contained in section 3 of the Act is of universal application – to all arbitrations within or without the Virgin Islands but rather, it points the other way – that is that the Act does not purport to set out the full scope of the court's jurisdiction in relation to foreign arbitrations.

(iii) Thirdly, that section 6(3) of the Act uses the term "only" in making plain that it is only those sections of the Act expressly listed in section 6(3) that are applicable to foreign arbitrations. Section 3 of the Act not being so listed, must be taken to mean that section 3 is not applicable to foreign arbitrations. Thus, Sonera says that the learned judge erred in seeking to rewrite section 6(3) of the Act by seeking to include section 3 to the exhaustive list of sections contained in section 6(3).

(iv) Fourthly, that the learned judge having reasoned that section 6(3) of the Act did not extend to any of the preliminary matters contained in sections 1 to 5 of the Act[15] but which nonetheless must be taken to refer to all arbitrations – domestic or foreign – and thus so did section 3, led him erroneously to conclude that the exception of sections 1 to 5 in relation to a foreign arbitration would require a rigid reading of section 6(3) leading to an absurdity. Rather, says Sonera in essence, the preliminary matters covered in sections 1 to 5 of the Act (method of citation, definitions and such) are precisely that – preliminary and non-substantive matters – in short, having no substantive impact on either a domestic or foreign arbitration.

(v) Fifthly, there is nothing in section 3(2)(b) of the Act which in fact makes it applicable to foreign arbitrations. Sonera says that the word 'arbitration' is used in a neutral context and is so used

[15] See: para. 21 of his judgment.

throughout the Act. Therefore, the learned judge was wrong to attach any weight to the fact that '[n]o distinction is drawn in section 3 of the Act between domestic and foreign arbitrations';[16] that the effect of section 6(3) being that section 3 has no application to foreign arbitrations it was unnecessary, for section 3 to provide for any such distinction.

(vi) Sixthly, the 'principle' contained in section 3(2)(b) of the Act that 'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in the Act' is derived from Article 5 of the UNCITRAL Model Law which uses very similar wording: 'In matters governed by this Law, no court shall intervene except where so provided in this Law'. Sonera says the learned judge referred indirectly to this point in referring to the decision of the English Supreme Court in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC[17] and that Article 5 of the UNCITRAL Model Law itself expressly says Article 5 only applies if the place of arbitration is in the territory of the relevant enacting State – thus in relation to the Act, to an arbitration seated in the Virgin Islands. This, Sonera says, is clear from:

(a) Article 1(2) of the UNCITRAL Model Law which provides: 'The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State'. Article 5 is not included in the list of exceptions; and

(b) Bachand[18] in his chapter from 'Anti-Suit Injunctions in International Arbitration'[19] noted: 'it is important to point

[16] See: para. 15 of his judgment.
[17] [2013] 1 WLR 1889.
[18] Frédéric Bachand, Professor of Law, McGill University.
[19] Emmanuel Gaillard, ed., Anti-Suit Injunctions in International Arbitration, IAI Series on International Arbitration No. 2 (Juris Publishing 2005).

out that Article 5, which is not listed in Article 1(2) of the Model Law, is only applicable if the arbitration is taking place where judicial intervention is sought; the prohibition on judicial intervention … provided for in the Model Law is therefore not applicable in connection with an arbitration taking place abroad …'[20]. Accordingly, says Sonera, the learned judge's conclusion that the principle in section 3(2)(b) is generally applicable to foreign arbitrations is irreconcilable with the derivation of that principle from Article 5 of the UNCITRAL Model Law.

(vii) Seventhly, Sonera says that the judge's conclusion is also irreconcilable with his own finding[21] that section 10 of the Act 'has no application in relation to an arbitration with a foreign seat'. Sonera says this conclusion is correct because section 10 is not one of the sections listed in section 6(3) of the Act as being applicable to a foreign arbitration. However: (i) section 10 of the Act is the section which expressly gives effect to Article 5 of the UNCITRAL Model Law; (ii) consistent with the Model Law itself, the draftsman of the Act plainly did not intend the principle in Article 5, as a matter of BVI law, to apply to foreign arbitrations; (iii) the principle in section 3(2)(b) (derived from Article 5) could not therefore have been intended to apply to a foreign arbitration; and (v) it is therefore not surprising that neither section 3(2)(b) nor section 10 are included in the section 6(3) list of the 'only' sections applicable to foreign arbitrations.

[20] See: p. 111 of Anti-Suit Injunctions in International Arbitration.
[21] At para. 22.

(viii) Eighthly, it follows that there is no 'difficulty' and nothing 'unexpected'[22] in the principle or policy of judicial non-interference (reflected in both section 3(2)(b) and section 10 of the Act) applying only to arbitrations seated in the Virgin Islands. This, says Sonera, is what the UNCITRAL Model Law contemplates and this is precisely what the Act provides.

(ix) Ninthly, Sonera says that the learned judge misinterpreted the English decision in AES. There, the English Supreme Court considered the provisions of the English Arbitration Act 1996 ("the UK Act"), which are the equivalent of section 3(2)(b) of the Act, and the general power to grant injunctive relief based on the English Senior Courts Act 1981 (the equivalent of section 24 of the Supreme Court Act). The English Supreme Court held that the UK Act had not abrogated or restricted the Court's general power to grant injunctive relief. As Lord Mance JSC noted: 'it would be astonishing if Parliament should, silently and without warning, have abrogated or precluded the use by the English Court of its previous well-established jurisdiction under section 37 in respect of foreign proceedings commenced or threatened in breach of the negative aspect of an arbitration agreement'[23]. Sonera posits that although AES was concerned with the power to restrain foreign proceedings brought in breach of an arbitration agreement, the same reasoning should apply here and more forcefully so where the jurisdiction is here invoked to protect this court's own process, judgments and orders where the Enforcement Judgment has become final and unimpeachable. Sonera says that the basis on which the learned judge sought to distinguish AES from the case at bar by pointing to the difference

[22] See para. 20 of the learned judge's judgment.
[23] At para. 57.

between the words 'should not' (UK Act) and 'shall not' (the Act) is a false distinction unsupported by AES itself.

(x) Tenthly, Sonera says that the learned judge was wrong to find support for his erroneous conclusion that 'section 3(2)(b) contains a blanket prohibition on all interference'[24] by his suggestion that the draftsman of the Act would have had in mind the terms of section 1(c) of the UK Act and AES. Even so, says Sonera, section 1(c) of the UK Act is derived from Article 5 of the UNCITRAL Model Law where the principle of judicial non-intervention has no application to foreign arbitrations, and thus the draftsman of the Act would have been aware of this and this is what is expressly reflected in section 10 of the Act and its non-inclusion in the list in section 6(3) which expressly sets out those sections of the Act made applicable to foreign arbitrations.

(xi) Finally, Sonera says that it is inconceivable that the Act would have removed this important protective jurisdiction, particularly: (i) implicitly rather than expressly and without any good reason or seemingly prior debate; (ii) in respect of vexatious foreign arbitral proceedings but not foreign court proceedings of an equally vexatious nature; and (iii) in a manner that effectively extends the application of Article 5 of the UNCITRAL Model Law beyond its universally acknowledged scope – being domestic arbitration only.

[24] See para. 24 of the learned judge's judgment.

CH**'s arguments**

[13] CH says there are two relevant contextual points bearing on the construction of the Act. First, the basics of the international arbitral order and secondly the controversy surrounding the legitimacy of anti-arbitration injunctions.

The basics of the international arbitral order

[14] It is a fundamental feature of the international arbitral order that every arbitration must have a seat. In essence it must be anchored to a particular national legal system. This operates in an analogous manner as an exclusive jurisdiction clause in an international commercial contract. The seat of the arbitration dictates the legal system and thus the court of that legal system which is thus empowered to exercise supervisory jurisdiction over the arbitration. This view is amply supported by judicial authority.[25] Accordingly, the court of the seat of the arbitration has greater control over an arbitration seated within its jurisdiction with greater powers of intervention, than an arbitration seated in a foreign state – outside its jurisdiction. This is invariably a feature of each and every national arbitration code in essence, and, I may add, would be surprising were it otherwise in recognition of the sovereignty of nations and a nation's rights to make laws regulating its domestic space.

Anti-arbitration injunctions – The controversy

[15] The issue of the appropriateness of the anti-arbitration injunction in the context of international arbitral order and specifically in relation to the New York Convention has generated much debate:

(i) Schwebel[26] opines that:

> "When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in the contract, that court fails 'to refer the parties to arbitration'

[25] See: Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru [1988] 1 Lloyd's Rep 116 per Kerr LJ at pp. 119-120; C v D [2008] Bus LR 843 per Longmore LJ at para. 17.
[26] Stephen M. Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview (2005).

> (Art. II(3)). In substance, it fails anticipatorily to 'recognise arbitral awards as binding and enforce them,' (Art. III) and it preemptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V ….
>
> "It follows that the issuance by a court of an anti-suit injunction … is inconsistent with the obligations of the State under the New York Convention. It is blatantly inconsistent with the spirit of the Convention."

(ii) In Karaha Bodas Co. v Negara,[27] the court, speaking of anti-suit injunctions, opined that '[r]eaching out to enjoin proceedings abroad cuts against the Convention's grants of separate and limited roles of primary-jurisdiction courts to annul awards, and of secondary-jurisdiction courts to enforce, or refuse to enforce, awards in their own countries'[28].

(iii) More or less similar opinions[29] are expressed by various writers and proponents of commercial arbitration as an alternative to dispute resolution by the parties' chosen method rather than through the courts.

States' responses to the controversy

[16] CH says that different jurisdictions have responded to the controversy in different ways and that some have imposed a blanket ban on anti-arbitration injunctions and some have not and refers to the position in England where it says that the choice was made not to impose a blanket ban on anti-arbitration injunctions, firstly by reference to the language used in the UK Act, section 1(c) which says: 'in

[27] 335 F.3d 357 (2003).
[28] At p. 373.
[29] See for example: Bachand, The UNCITRAL Model Law's Take on Anti-Suit Injunctions (2005); Kaufmann-Kohler and Rigozzi, International Arbitration (2010); Arroyo, Arbitration in Switzerland: The Practitioner's Guide; Stacher, You Don't Want to Go There – Anti-suit Injunctions in International Commercial Arbitration (2005).

matters governed by this Part the court should not intervene except as provided by this Part' (emphasis added).

[17] Section 1(c) of the UK Act came up for consideration before the English courts.

(i) In China Petroleum Technology and Development Corporation v L.G. Caltex Gas Co. Ltd. and Others,[30] Smith J opined that 'That section [1(c)] provides guidance to the court, it does not remove jurisdiction from the court'.

(ii) In Elektrim SA v Vivendi Universal SA (No 2),[31] Aikens J said 'Section 1(c) of the Act is an express statutory warning[22] [*I use the word "warning" rather than "prohibition" …*]'[32]

(iii) In AES, at paragraph 33, Lord Mance JSC said:

> "The use of the word 'should' in section I(c) was … a deliberate departure from the more prescriptive 'shall' appearing in article 5 of the UNCITRAL Model Law. … Even in matters which might be regarded as falling within Part I, it is clear that section I(c) implies a need for caution, rather than an absolute prohibition, before any court intervention."

[18] CH says that a different choice was made in the Virgin Islands to impose a blanket ban and that the draftsman being well aware of the basics of the international arbitral order and the controversy surrounding anti-arbitration injunctions made this deliberate choice and expressly provided in section 3(2)(b) that 'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act' (emphasis added). In essence, CH contends that the use of the prescriptive 'shall' rather than 'should' imposes a prohibition and thus removes the court's jurisdiction to interfere.

[30] EWHC (5th December 2000, unreported).
[31] [2007] 2 Lloyd's Rep. 8.
[32] At para. 67.

[19] CH further contends that Sonera's argument that section 3(2)(b) is applicable to domestic arbitrations only and does not apply to foreign arbitrations having regard to section 6(3) is hopeless because:

(i) the purpose of section 6(3) is to limit the powers which the court can exercise in respect of a foreign arbitration but sections 1-5 of the Act are of general application.

(ii) This, it says, is further supported by the language used in section 3(2) and section 6(3):

(a) Section 3(2) of the Act begins with the words 'This Act is founded on the following principles' and goes on to expressly provide in subsection (b) 'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act' (underlining added by CH in both quoted phrases). This CH says, means the whole Act is founded so to speak on the principle of judicial non-inference.

(b) Section 6(3) provides that 'Where the place of arbitration is outside the Virgin Islands, only sections 18, … and Part X apply to the arbitration' (underlining added by CH). CH accordingly argues that in section 6(3) the focus is on the arbitration as distinct from the Act and is there dealing with the powers that the court can exercise in respect of a foreign arbitration; that each of the provisions therein referenced empowers the court to intervene or act in some way in support of an arbitration, but that this does not change the principles on which the Act is founded nor the overriding instruction given to the court in section 3(2) nor does it purport to do so.

(iii) The other provisions of section 3(2) are inconsistent with Sonera's analysis:

(a) Section 3(2)(a) provides that 'subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved'. CH posits that this cannot be said to be the position only if the parties agreed to a domestic arbitration.

(b) Section 3(2)(c) says that 'where the Court interferes in the arbitration pursuant to the expressed provisions of this Act it shall, as far as possible, give due regard to the wishes of the parties and the provisions of the arbitration agreement'. Again, says CH, this could not be the case only in respect of a domestic arbitration.

(iv) Other provisions of the Act, for example section 43 which empowers the court to grant interim measures in relation to foreign arbitrations (i) provides only for limited kinds of interventions and (ii) requires the court to have regard to the fact that the power is 'for the purposes of facilitating the process of a court or arbitral tribunal outside the Virgin Islands that has primary jurisdiction over the arbitral proceedings'[33]. Thus, the court can only intervene where expressly provided and can do so only in support of the arbitral process and not in obstruction of it.

(v) Having chosen the policy of non-intervention in the case of domestic arbitrations it would be extraordinary for the legislature to have chosen any different policy to apply in the case of foreign arbitrations.[34] CH says that Sonera's construction of the Act would result in the court having

[33] See: s. 43(7)(b) of the Act.
[34] See: para. 20 of the learned judge's judgment.

> greater power of interference over a foreign arbitration than it would have over a domestic one and such an approach would put the Virgin Islands at odds with the entire international arbitral order and that there is no basis for suggesting that the legislature intended such an extraordinary result.

[20] On these counter-arguments put forward, CH says that the learned judge was right to conclude that he had no jurisdiction/power to grant the relief sought by Sonera.

Discussion

[21] To my mind, it is clear, when one considers section 6(2) of the Act, that the entire scheme of the Act is intended to operate mainly as a complete arbitral code in respect of arbitrations seated in the Virgin Islands, irrespective of the place or country in which the arbitration agreement was entered into. In essence, it is to govern all arbitrations being undertaken domestically including those provisions which are expressed by section 6(3) to apply also to arbitrations with a foreign seat. Or put another way, it is not intended that the other provisions of the Act are to govern or operate in respect of foreign arbitrations save and except those provisions namely, sections 18, 19, 43, 58 and 59 and Part X of the Act, which are expressly made to apply in respect of a foreign arbitration. There is to my mind nothing unusual about this as laws enacted domestically are generally understood and treated as having territorial effect unless a provision is clearly expressed to have extra-territorial effect or, of necessity, must be construed as having extra-territorial effect. This limitation to territory recognises the sovereignty of nations whose purview it is to make laws governing and regulating the affairs within its own jurisdictional limits normally defined by its territorial boundary.

[22] As the learned judge found in paragraph 21 of his judgment, after consideration of the structure of the Act (paras. 17, 18, and 19):

> "The Act operates to provide a complete arbitral code for the Virgin Islands, something which it achieves by enacting sections 7 to 92. … [T]he Act, by section 6(3), stipulates which parts of it are to have application with respect to foreign arbitrations. It does this by the device

> of providing that of the provisions of the code, only those expressly identified in section 6(3) are to apply to foreign arbitrations."

I am in complete agreement with these statements. The learned judge left out sections 1 to 6 of the Act (all contained in Part I) which dealt with 'Preliminary matters' such as the definition sections (section 2), the object and principles of the Act (section 3), UNCITRAL Model Law save for the modifications and supplements of the Act (section 4), the Act's applicability to the Crown (section 5) and the applicability of the entirety of the Act to domestic arbitrations only save and except those sections expressly made applicable to foreign arbitrations (section 6).

[23] The learned judge went on to hold in paragraph 21 that:

> '[S]ection 6(3) does not extend to any of the Preliminary matters contained in sections 1 to 5. … It would be absurd to suppose that the commencement provisions in section 1(2) or the definitions in section 2 have no application in a case involving an arbitration with a foreign seat …. Section 3(2)(b) is similarly unaffected, in my opinion, by the operation of section 6(3)."

In essence, the learned judge held that notwithstanding the expressed limitations contained in section 6(3) as to the provisions of the Act which are expressed to be applicable to foreign arbitrations, that the Preliminary matters contained at sections 1 to 5 of the Act were equally applicable to foreign arbitrations. This led him to the view expressed in paragraph 22 that section 10 of the Act also ought to have been included in the section 6(3) list of provisions made expressly applicable to foreign arbitrations.

[24] With utmost respect to the learned judge, I am unable to accept that sections 1 to 5 are intended to govern foreign arbitrations if this is what is meant by being 'applicable' to foreign arbitrations. Rather, in my view, the Preliminary matters do no more than set out for the purposes of Virgin Islands law the meaning to be given to the terms thereby defined and recognises the body and process, be it within or without the Virgin Islands, as, for example, an 'arbitral tribunal' and an 'arbitration'. It does not seek to define the term 'arbitrator' but defines 'arbitration

agreement' by incorporating the definition given thereto under Article 7 of the UNCITRAL Model Law. Thus, for the purposes of Virgin Islands Law, an 'arbitration agreement' would be one which meets the definition in section 2 of the Act irrespective of whether the agreement was executed within or outside the Virgin Islands. To this extent and in this context only can it be said in my view that various definitions contained in section 2 may apply to foreign arbitrations. Similarly, there can be no doubt that the reference to the 'Crown' in section 5 can only be a reference to the Crown in right of government in the Virgin Islands and not to a sovereign of another foreign state.

[25] I am also of the view that the learned judge's conclusion that section 10 of the Act (which incorporates Article 5 of the UNCITRAL Model Law), ought to have been included in the list under section 6(3), cannot be sustained. As the very provision of Article 1(2) of the UNCITRAL Model Law states, as well as the text of Bachand referred to by Sonera and set out at paragraphs 12(vi)(a) and (b) above, Article 5 of the UNCITRAL Model Law has no application to a foreign arbitration but rather applies to an arbitration taking place in the State in which court intervention is being sought. The prohibition against court intervention is understood under Article 1(2) and Article 5 of the UNCITRAL Model Law as being applicable to a domestic arbitration and not to one taking place in a foreign seat. The learned judge, in expressing this view, was doing so contrary to the well-recognised application and scope of Article 5 of the UNCITRAL Model Law which was expressly incorporated by virtue of section 10 of the Act. It must then have been intended by the draftsman, in omitting section 10 of the Act from the list under section 6(3), to conform to the established and internationally recognised scope of Article 5 of the UNCITRAL Model Law in not extending its applicability to foreign arbitrations. This, to my mind, is also in keeping with the express statement in section 6(2) of the Act which makes clear that 'this Act applies to an arbitration … if the place of arbitration is in the Virgin Islands' This provision is made subject to 6(3) which expressly states in my view an exhaustive list of the provisions of the Act which are made to apply to foreign arbitrations.

[26] This brings me to a consideration of section 3(2)(b) and whether this provision is to be read into or added to the list contained in section 6(3) as the learned judge appears to have held. There is no doubt that one of the expressed principles on which the Act is founded is that of non-interference by the court in the arbitration of a dispute except as expressly provided by the Act. The question is whether this expressed principle contained in an Act which itself expressly says that it applies only to arbitrations seated in the Virgin Islands, and which expressly states exhaustively those provisions which are the only provisions to be applied to a foreign arbitration, may be taken as extending to a foreign arbitration. This calls for a consideration of discerning from where this principle may be said to have been derived.

[27] What is clear is that the Act sought to give effect to the UNCITRAL Model Law. Section 2(3) says: 'A reference in this section to "this Act" shall be construed to include the UNCITRAL Model Law'. Section 4 says: 'The provisions of the UNCITRAL Model Law have the force of law in the Virgin Islands, subject to the modifications and supplements expressly provided in this Act'. This satisfies me that the non-interference principle expressed in section 3(2)(b) is reflective of the approach under the UNCITRAL Model Law as captured in Article 5 of that Law. I can see no good reason for reading it into the list under section 6(3) of the Act or put another way, extending the list under section 6(3) of the Act to encompass section 3(2)(b) of the Act.

[28] To my mind, section 3(2)(b) of the Act does no more than state the policy as to how arbitrations are to be viewed and governed in the Virgin Islands, with a clear prohibition or warning to the court in the seat of the arbitration not to interfere in an arbitration. To my mind the warning to the court contained in section 3(2)(b) as a guiding principle informs the court's approach to an arbitration, be it domestic or foreign. That said, it seems to me that a clear distinction is to be drawn between interference with an arbitration on the one hand, and restraining a party who may be using, be it an arbitral process or a court process, in a manner which may be

said to be vexatious, or oppressive and abusive of the court's own process, on the other. The equitable remedy of an injunction was developed by the courts of equity to relieve, among things, against unconscionable conduct, or conduct the aim of which is to undermine the court's lawful processes. The inherent jurisdiction of the court to act to protect its process from abuse is perhaps more acutely relevant today than in times past where the very methods of attack may be more sophisticated with the changing shades subtler than the chameleon. Further, the power of the court expressed in section 24 of the Supreme Court Act to grant injunctions in circumstances as the court deems just and convenient, is a power expressed in the broadest terms. It is clearly a power which must remain flexible, as what justice may require, will vary from case to case.

[29] In echoing the expression of Lord Mance JSC in AES, it would be astonishing to say the least, if the statement to the effect that the Act is founded on the principle that 'the Court shall not interfere in the arbitration of a dispute' is to be construed as having thereby, without any specifically expressed and clear language, swept away the court's jurisdiction to grant injunctive relief where warranted. In speaking of the UK Arbitration Act 1996 and the policy of non-interference by the court expressed therein and its correlation to section 37 of the Senior Courts Act 1981 (the equivalent of section 24 of the Supreme Court Act) Lord Mance JSC adopted the words of Lord Mustill in Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd. and Others[35] in respect of the earlier Arbitration Act 1950:[36]

> "Under section 37(1) by contrast the arbitration clause is not the source of the power to grant an injunction but is merely a part of the facts in the light of which the court decides whether or not to exercise a power which exists independently of it."

He then went on to say as follows:

> "The court may as a result need to be very cautious, 'in the exercise of its general powers under section 37 so as not to conflict with any restraint

[35] [1993] AC 334 at 360E-F.
[36] See: para. 56 of AES case.

> which the legislature may have imposed on the exercise of the new and specialised powers': p 364B-C. However, it is, in my opinion, entirely understandable that Parliament should not have thought to carve out from section 37 of the Senior Courts Act 1981 or to reproduce in the 1996 Act one aspect of a general power conferred by section 37. It cannot be deduced from the fact that it did not do so that it intended that the general power should never be exercised in any context associated with arbitration.
>
> "On the contrary, it would be astonishing if Parliament should, silently and without warning, have abrogated or precluded the use by the English Court of its previous well-established jurisdiction under section 37 in respect of foreign proceedings commenced or threatened in breach of the negative aspect of an arbitration agreement. One would have expected the intended inapplicability of section 37 to have been made very clear in … the Act."

[30] I adopt these passages to the position under the Act. Any provision of a statute which seeks to oust the court's jurisdiction must be expressed in clear terms. The statement of policy contained in section 3(2)(b) of the Act does not meet this standard. Indeed, there is no reference whatsoever in the Act to any provision in the Supreme Court Act. Anyone would expect that were it intended that section 24 of the Supreme Court Act were to be considered as having been abrogated by the stated principle in the Act that specific reference would have been made to it. More so, such a proposed course would no doubt have aroused much debate given what could only be described as far-reaching and unprecedented consequences as it relates to the power of the court in granting a type of relief to which the court for centuries has had resort in meeting the ends of justice.

[31] The statement of the principle of non-intervention in the Act does not in my view remove or affect the court's long established jurisdiction under the Supreme Court Act nor does it affect the court's inherent jurisdiction. The principle so stated in the Act is, in my view, precisely that: a principle by which the court is to be guided in the exercise of the jurisdiction or the approach to be adopted in determining in any particular case whether the exercise of the jurisdiction may be said to be done with due regard for the principle – in essence, the caution lies in

ensuring that the court's exercise of its jurisdiction in the context of an arbitration is not effected in a manner which may be considered to be unprincipled.

[32] Here, it may be said to be wrong in principle to restrain the SPA Arbitration in and of itself as it cannot be disputed that the SPA contained an agreement for the settling of the parties' disputes by arbitration. However, as has been seen, the relief that CH now seeks is not limited to an arbitral award in damages, as the learned judge put it 'designed to wash through the First Tribunal's Final Award',[37] but also orders from the Second Tribunal aimed at nullifying or rendering wholly ineffective this court's judgment by:

(a) restraining Sonera from relying upon or enforcing this court's judgment; and as well

(b) by an 'unwinding' of the charging order granted by this court by way of enforcing this court's judgment which has become final and no longer assailable. This, it seeks to do, by way of injunctive orders, to be granted by the Second Tribunal, against Sonera.

[33] It is clearly within any of the parties' rights to engage in a second arbitration pursuant to the SPA and for CH to seek thereunder an equal and opposite award in its favour against Sonera. Thus, to restrain CH from pursuing such a course may be considered, in the context of the Act, to be unprincipled or contrary to the expressed principle in section 3(2)(b). It is quite a different thing however, to say that the court is powerless, by virtue of the stated principle of non-interference in an arbitration contained in that section, to restrain a party who is subject to its jurisdiction, as CH is, from pursuing a course of action or conduct designed or directly aimed at impugning this court's process (if so found), even if its chosen method by which this is being undertaken is through the arbitral process. In this respect it cannot be said that the court is 'interfering' in an arbitration. In my view it would clearly not be. Rather, the court would be doing no more than ensuring

[37] At para. 10 of the learned judge's judgment.

that its own process is protected from abuse by the conduct and actions of that party.

[34] To this end it is useful to be reminded of the statement of Lord Hobhouse of Woodborough in Turner v Grovit and Others,[38] a decision of the House of Lords, in which he had this to say regarding anti-suit injunctions (the principles of which are equally applicable to anti-arbitration injunctions):

> "The present type of restraining order is commonly referred to as an 'anti-suit' injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English Court [like the BVI Court] makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court [tribunal]: Lord Goff of Chieveley, *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, 892."

Conclusion

[35] For the reasons given above, I respectfully differ from the view held by the learned trial judge that section 3(2)(b) has taken away the court's jurisdiction to grant injunctive relief as provided under section 24 of the Supreme Court Act. The Court retains its general power and jurisdiction provided under section 24. It is a power wholly independent of the provisions of the Act. I would accordingly hold that the learned judge erred in arriving at the conclusion to which he came. This then leads to a consideration of the second question: whether the jurisdiction ought to be exercised in favour of Sonera.

[38] [2002] 1 WLR 107 at p. 117 (para. 23).

The exercise of the discretion

(a) The principles

[36] The grant of an injunction to restrain foreign proceedings, be it court proceedings or arbitration proceedings, is a jurisdiction which is to be exercised with caution and will only be granted in exceptional circumstances.[39] The bases on which a court will do so are:

(a) in respect of an infringement of a legal or equitable right of a party. This relates to instances where the parties have contractually agreed to submit disputes to a particular court or to arbitration and one party has commenced proceedings in breach of that agreement; or

(b) if the proceedings are vexatious, oppressive or unconscionable. This will cover cases where there is no agreement but the court concludes that the ends of justice so require.[40]

[37] Mr. Valentin, counsel for Sonera, has very helpfully summarised in his written submissions buttressed with authorities, circumstances in which arbitral proceedings may be considered as an infringement (or threatened infringement) of the legal right of a party. He has also summarised, by reference to the authorities, circumstances in which arbitral proceedings may be considered as being vexatious, oppressive or unconscionable. I adopt them here as they are not in dispute.

[38] Arbitral proceedings may be considered as an infringement of a legal right where:

(i) their purpose is irreconcilable with:

(a) the parties' agreement to arbitrate because what is sought in effect is to invalidate an earlier final award;[41]

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[39] See: Amir Weissfisch v Anthony Julius and Others [2006] 1 Lloyd's Rep 716.

[40] See: Elektrim SA v Vivendi Universal SA (No. 2) [2007] 2 Lloyd's Rep. 8 per Aikens J at para. 56; Stichting Shell Pensioenfonds v Krys and Another [2014] UKPC 41; Airbus Industrie GIE v Patel and Others [1999] 1 AC 119; Société Nationale Industrielle Aerospatiale v Lee Kui Jak and Another [1987] AC 871.

[41] See: Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] 1 Lloyds Rep 442, per Smith J at para. 31.

(b) a party's right to have an earlier final award carried out by a losing party;[42] or

(c) a party's right to enforce an earlier final award by judgment or otherwise in any court having competent jurisdiction;[43] or

(ii) Where they seek to re-litigate issues which have been finally determined in an earlier award, which gives rise to an estoppel.[44]

[39] Arbitral proceedings may be considered to be vexatious, oppressive or unconscionable where:

(a) They amount in effect to a collateral attack on an award made in an earlier arbitration by a properly constituted tribunal that is binding on the parties;[45]

(b) It is sought to re-litigate issues already decided in an earlier arbitration in an attempt to frustrate enforcement of an award made in the earlier arbitration;[46] or

(c) There is interference with the jurisdiction and due process of the enjoining court and its proceedings which the enjoining court is bound to protect.[47]

The circumstances

[40] Sonera argues that the court is justified in granting injunctive relief in its favour and the learned judge ought to have so granted as CH, by pursuit of the Second SPA Arbitration, is, in effect: (i) attacking the integrity to the enforcement proceedings

[42] See: Article 34(6) of the ICC Rules incorporated by reference in the arbitration clause in the Letter Agreement.
[43] See: Article 4(e) of the Letter Agreement pursuant to which the Final Award was made. This right is now reflected in s. 86 of the Act.
[44] See: Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 All ER (Comm) 253 (Privy Council) where it is now well settled that issue estoppel equally applies to arbitration as it does to litigation.
[45] See: Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] 1 Lloyds Rep 442.
[46] See: Injazat Technology Capital Limited v Dr. Hamid Najafi [2012] EWHC 4171 (Comm) per Flaux J at para. 22.
[47] See: Masri v Consolidated Contractors International (UK) Ltd and Others (No. 3) [2009] QB 503; Turner v Grovit and Others [2002] 1 WLR 107; South Carolina Insurance Co. v Assurantie Maatschappij "de Zeven Provincien" N.V. [1987] AC 24.

currently underway before the court below; (ii) pursuing proceedings for the purpose of outflanking the court's Enforcement Judgment; (iii) claiming relief in Geneva which if granted, will prevent Sonera from enforcing the Enforcement Judgment in accordance with BVI law. Sonera relies on the statements made by the learned judge at paragraph 35 of his judgment where, after referring to the well-established principles set out in the decisions of Turner v Grovit and Masri v Consolidated Contractors International (UK) Ltd and Others (No. 3),[48] to the effect that an English Court (similarly, a BVI Court) will act to protect the integrity of English (BVI) proceedings by restraining where necessary, unsuccessful parties from re-litigating abroad and will thus act where necessary to protect its processes and judgments, he had this to say:

> "It seems to me that it is the principle underlying these two last cases that has the closest connection with the issues which have been canvassed in the present case, where what Sonera is complaining about is the fact that the processes of the DSPA tribunal[49] are inherently subversive of the judgment – which is plainly so."

[41] Sonera says that the circumstances in this case justify the exercise of the jurisdiction because, as has become apparent from CH's September 2014 statement of claim, its claim in the SPA Arbitration is being pursued specifically to outflank and subvert the court's Enforcement Judgment and its orders made in enforcing that judgment (inclusive of its various costs orders). This, Sonera says, is '[a] blatant attempt by a recalcitrant judgment debtor to interfere with the due process of [the Virgin Islands High Court]' which is not the concern of any other court or arbitral tribunal.

[42] Sonera in essence says that the pursuit by CH of the proceedings before the SPA Arbitration satisfies the circumstances which the courts have established as the bases for intervening. It says that it has established both bases as established in the authorities such as Elektrim in that:

[48] [2009] QB 503.
[49] This is a reference to the Second Tribunal.

(i) the SPA Arbitration commenced by CH threatens the infringement of Sonera's legal right to enforce the Final Award as well as its right to be protected against the re-litigation of issues finally determined in the Final Award thereby giving rise to an estoppel on those issues; and

(ii) the SPA Arbitration is vexatious, oppressive and/or unconscionable because:

(a) it involves a collateral attack on the Final Award and a transparent attempt to frustrate enforcement of the Final Award in circumstances where the court has concluded on a final basis that the Final Award was made by a properly constituted tribunal with the necessary jurisdiction to make the Final Award and that Sonera is accordingly entitled to enforce it against CH's assets in this jurisdiction; and

(b) it is a direct interference with (and subversive of) this court's due process, proceedings and judgments in the ongoing enforcement proceedings before the court.

[43] Sonera also places reliance on the judgment of the learned judge rendered in May 2013 in which CH sought to restrain Sonera from pursuing enforcement proceedings in New York in which, in respect of Sonera's Enforcement Judgment, he stated at paragraph 7:

> "[I]t is clearly open to me, if I think fit, to grant an injunction to protect the integrity of the proceedings and of any judgments or orders made in those proceedings";

and at paragraph 13:

> "It is one thing for a Court to enjoin the prosecution of proceedings brought elsewhere in order to outflank the Court's order. It is quite another thing to prevent a judgment creditor in a foreign Court from seeking to enforce the judgment in accordance with the law of the jurisdiction in which he has obtained it."

Sonera says that each of the three circumstances identified by the learned judge for justifying injunctive relief has been satisfied in this case in that Sonera's pursuit of the SPA Arbitration is:

(i) an attack on the integrity of the court's processes, judgments and orders in respect of the Enforcement Judgment;

(ii) the prosecution of proceedings elsewhere aimed at outflanking the court's Enforcement Judgment; and

(iii) a proceeding elsewhere aimed at preventing Sonera, as a judgment creditor under BVI law from enforcing the Enforcement Judgment pursuant to the laws of the Virgin Islands.

[44] CH says that even if the Court has jurisdiction (which it says it does not), given the factual circumstances, it ought not to be exercised for the reasons set out in paragraph 4 above. I address each in turn.

Delay

[45] CH says in essence that Sonera ought to have applied for an anti-arbitration injunction, if at all, promptly after the SPA Arbitration commenced on 10th April 2012; that it waited over two and a half years to make its application during which time the SPA Arbitration has proceeded and thus such delay is fatal. To make good this point it relies on a number of decisions[50] and in particular the decision of Smith J in China Petroleum Technology and Development Corporation v L.G. Caltex Gas Co. Ltd. and Others[51] In China Petroleum there were two arbitrations. The first arbitral tribunal concluded that the contracts in issue had never been concluded. The unsuccessful party (as here) started a second arbitration under an arbitration clause in a closely connected contract. The second tribunal held that it was not bound by the findings of the first tribunal and issued a

[50] Intermet FZCO v Ansol Ltd [2007] EWHC 226 (Comm) (delay of 10 months); Elektrim SA v Vivendi Universal SA (No 2) [2007] 2 Lloyd's Rep. 8 (delay of 10 months); Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd [2009] EWHC 3629 (QB) (delay of 11 months).
[51] EWHC (5th December 2000, unreported).

partial award in which it concluded that it had jurisdiction over the merits of the dispute. An application was made approximately three years after the second arbitration had been commenced to stay the second arbitration, after it had already made the partial award. Smith J, opined that although he had jurisdiction to grant injunctive relief it should have been sought before the hearing which resulted in the partial award and declined to grant relief to 'prevent the consequences of that award being followed through'.

[46] Sonera says that it has not delayed as they only became aware of CH's true focus of the SPA Arbitration when CH filed its statement of claim therein on 19th September 2014. Sonera filed its application on 27th October 2014 and thus any relevant period to be considered would be from the time that CH made its intentions known in its statement of claim filed in September 2014.

[47] CH counters by saying that as from the Request for Arbitration in 2012 in which it sought damages against Sonera in '[a]ny amount that Sonera might be able to collect as a result of [the Final Award]' including costs which it incurred and is to incur – in relation to the enforcement proceedings, the aim of the SPA Arbitration was as 'plain as day' and that the statement of claim filed in September simply made explicit what was implicit in the relief sought in the Request for Arbitration.

[48] Additionally, CH says that Sonera was arguing all along from the time of CH's Request for Arbitration that the SPA Arbitration was an abuse of process and its right and an attempt to interfere with the enforcement of the Final Award. This was the thrust of its preliminary objection before the Second Arbitration. CH therefore says that it is therefore not the case that Sonera 'saw the light' on receipt of the statement of claim. Rather, CH says that it was only after Sonera failed on its preliminary objections before the Second Tribunal that it then sought to make this application.

[49] The judge below was not impressed by CH's delay point and made reference[52] to what he termed the 'geological timescale of this dispute and the absence of any prejudice to Cukurova [CH] arising from the fact that the injunction had not been sought earlier'. He concluded that he was not interested in CH's submissions on this point.

[50] Sonera says the need for an anti-arbitration injunction in reality arose only when the Second Tribunal ruled that it had jurisdiction to determine the dispute and having ruled that while some matters were res judicata not all the issues were, on the basis that some matters giving rise to the Final Award were in effect not within the jurisdiction of the First Tribunal but rather the Second Tribunal under the SPA. It is useful to be reminded here that one arbitration tribunal has no jurisdiction to overturn an award of an earlier tribunal or to determine the extent of jurisdiction of the other following the kompetenz-kompetenz principle. One does not enjoy a power of review in relation to the other.

[51] Sonera says it could not have properly troubled the court for an anti-arbitration injunction before that time and only when CH in its statement of claim made plain their focus in seeking to unwind all the charging orders and by which time the Second Tribunal had ruled that it had jurisdiction and that not all matters were res judicata. Sonera relies on the House of Lords decision in Turner v Grovit in which Lord Hobhouse of Woodborough made the point in relation to restraining a party from pursuing foreign proceedings that 'the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted'[53].

[52] At para. 11.
[53] At para. 26

Discussion

[52] The wisdom of such an approach is readily discernible for it is not until a foreign court or tribunal decides it has or assumes jurisdiction over the matter in dispute that a restraining order may be considered as necessary. Sonera's preliminary objections were clearly in the context of persuading the Second Tribunal not to assume jurisdiction (as that term is understood in the wider sense) as being tantamount to an abuse of process or its rights coupled with the principles of estoppel having regard to the issues determined in the Final Award. I see nothing inappropriate with this approach. Nor in my view is it one which lends credence to the delay argument put forward by CH.

[53] I am not persuaded by CH's delay argument for this additional reason. As I mentioned in my observations at the beginning of this judgment, these parties have been fighting many battles on many fronts in relation to the matters giving rise to the Final Award and now CH having lost all the way to the final court of this jurisdiction is now seeking to obtain in essence an award in its favour aimed at cancelling out the Final Award in Sonera's favour. While, in my judgment, the seeking of an award by CH in an amount equal to the Final Award may not necessarily or inherently be considered as being subversive of the court's Enforcement Judgment, in that such an award in CH's favour may allow CH, from a tactical standpoint, to set it up in effect as a set-off to Sonera's Final Award not only in this jurisdiction but elsewhere where Sonera may seek recognition and enforcement of its Final Award (and CH has made this point), it is quite a different thing to seek by way of relief, as expressly set out for the first time by CH in its statement of claim in September 2014, orders directly aimed at unwinding the Court's Enforcement Judgment and its orders made by way of enforcement thereof. These specific remedies now expressed by CH do not plainly follow from the Request for Arbitration commenced in 2012. CH, in addition to seeking damages in a sum equal to the Final Award has by its statement of claim specifically asked (i) that Sonera be restrained from relying on or making use of the Final Award and any decision or order enforcing that award including the

Enforcement Judgment and (ii) that Sonera unwinds the charge it has obtained over CH's assets in the Virgin Islands pursuant to the court's charging order by way of enforcement which was made final on 4th November 2014. These heads of relief are therefore aimed directly at the court's judgment which is in every respect final and its enforcement orders pursuant to that judgment. Such relief, if granted by the Second Tribunal would be plainly subversive of the court's judgment and a direct interference with this court's processes in the exercise of its enforcement jurisdiction recognised by the New York Convention in respect of a convention award. The Final Award is such an award and the effect would be to all intents and purposes not simply an outflanking of the court's judgment but a nullification of it. This course, signaled by CH in its statement of claim ought not to be permitted as it cuts across the enforcement regime established by the Convention itself.

Participation

[54] CH says that the SPA Arbitration has proceeded for almost three years with the full participation of Sonera. In answer to Sonera's point that it has participated for the purpose of having the second set of arbitral proceedings dismissed, CH says this is an inadequate answer because:

(i) Sonera has expressly accepted the Second Tribunal's jurisdiction to determine all the matters before it.

(ii) In seeking the dismissal of CH's claims on res judicata and abuse of right grounds (as opposed to jurisdictional grounds) Sonera has effectively fought (and lost) a substantive preliminary issue. This amounted to a participation on the merits.

(iii) Sonera's participation in the Second Arbitration has gone further in that it has filed its Answer to CH's statement of claim.

[55] Sonera counters by saying that it cannot be said that the arbitration proceedings are too far advanced, as pleadings had not yet closed and it was unlikely that a final hearing was likely to take place until the later part of 2015 at the earliest. Further, that the true focus of the SPA Arbitration was the prevention of the enforcement of

the Enforcement Judgment set out in the filed statement of claim in September 2014 which marked a radical change from the relief sought in the April 2012 Request for Arbitration. Sonera also makes the point that the Second Tribunal, having ruled that it has jurisdiction, it became necessary to file further pleadings, but this makes no difference to the court exercising its jurisdiction in protecting its processes, judgments and orders and its jurisdiction to enforce Convention Awards. It is in respect of this only that the court need be concerned. I agree.

[56] I do not consider that Sonera could argue that the Second Tribunal lacked jurisdiction in the strict sense of that term. It is beyond dispute that the SPA (like the Letter Agreement) contained its own arbitration clause. The First Tribunal took jurisdiction under the Letter Agreement while the Second Tribunal took jurisdiction under the SPA. I am satisfied that Sonera participated for the purpose of seeking the summary dismissal of CH's claims. More importantly in my view is the direct aim taken by CH on the Court's Enforcement Judgment and orders in seeking an unwinding of them as expressed in its statement of claim. It is with that aspect that this court must be concerned. The court must assess the conduct of CH in its evinced intention based on the expressed remedies that it seeks in the SPA Arbitration. This to my mind has nothing strictly to do with the proceedings before the Second Tribunal. I am not persuaded, given the facts and circumstances of this case, that this factor alone should militate against Sonera obtaining relief.

Second bite at the cherry

[57] CH says Sonera's application is unprecedented because they seek an anti-arbitration injunction on the ground that the proceedings are abusive when it lost before the Second Tribunal on that point. This application, CH says, is therefore an attempt by Sonera to have a second bite at the cherry having lost on this point before the Second Tribunal. CH relies on China Petroleum where relief was refused, and the dictum of Aikens J in Elektrim where he stated at paragraphs 74-75:

> "74. … [E]ven if Elektrim could establish that one of its legal or equitable rights had been infringed or was threatened by the continuation of the LCIA arbitration … or even if it could establish that the continuation of the LCIA arbitration was otherwise vexatious, oppressive or unconscionable, in this case the court should not invoke the power to grant an injunction ….
>
> "75. … [T]o do so would be contrary to the agreement of the parties to refer the … disputes to the LCIA arbitrators and to do so under the provisions of the 1996 Act and the LCIA Rules of procedure. … [T]he LCIA arbitration tribunal has decided, on three occasions, not to stay the LCIA arbitration. … [T]o attempt to invoke section 37 as a means of reviewing or overruling the tribunal's decisions would undermine the principles of the 1996 Act and would grant the court a general supervisory power which it has never had."

CH says that even if this court may think that the Second Tribunal 'got it wrong' in the Partial Award, this does not afford a reason for granting the injunction. Injunction or not, the Partial Award exists and would continue to exist. CH says that by parity of Sonera's own reasoning in seeking to persuade the Second Tribunal that the re-litigation of issues determined by the Final Award is illegitimate so too is its attempt to have this court decide an issue which was earlier determined against it by the Second Tribunal.

[58] Sonera says in answer to this argument that it is CH who is seeking to have a 'second bite at the cherry' by bringing the SPA Arbitration in the first place – seeking to re-litigate all the same issues already determined once and for all in the First Arbitration (including the question of jurisdiction). In any event, says Sonera, the application is not 'a second bite at the cherry' because the SPA Arbitration has never had to consider whether the relief claimed by CH in its statement of claim is an objectionable attempt to subvert the Enforcement Judgment (which in any event is of no concern to the arbitral tribunal). As to this last point, CH says that the Second Tribunal was well aware of the nature and potential implications of CH's claims at the time it issued its Partial Award and that the fundamental nature of CH's claim has not changed since then.

[59] I have already expressed a view in paragraph 53 in relation to the claim by CH in the SPA Arbitration for, in essence, compensatory damages in respect of sums made payable by it to Sonera under the Final Award pursuant to the First Arbitration. The fact that Sonera lost on its abuse argument raised in its preliminary objections before the Second Tribunal, coupled with the fact that the Second Tribunal has jurisdiction in the sense earlier described pursuant to the SPA, is a highly persuasive argument for concluding, in line with the dictum of Aikens J in Elektrim that, as it relates to CH's claim for compensation before the Second Tribunal, an injunction ought not to be granted in restraining this claim from proceeding before the Second Tribunal having rejected Sonera's abuse of process and abuse of right arguments. I agree with CH that it is not the role of this Court to act in a supervisory capacity over the arbitral tribunal even if this Court considers that the Second Tribunal 'got it wrong'. That said, it is quite a different thing however, to suggest by the same reasoning as CH does, that CH ought to be allowed to seek relief from the Second Tribunal directly aimed at unwinding and nullifying this court's processes, judgments and orders based on the Final Award where the Final Award is not open to being impeached by CH even in Switzerland, the seat of the First Arbitration. These are distinctly different remedies from seeking an award in a sum equal to the Final Award. These are remedies aimed at a very specific court process. Were such remedies to be granted, it would, in my view, amount to a blatant and direct interference with the court's processes, a direct attack on this Court's Enforcement Judgment grounded in a Final unimpeachable Convention Award. This is the expressed thrust of the additional reliefs set out in CH's statement of claim. In my view, it cannot be an adequate answer to say that the Second Tribunal was well aware of the nature and potential implications of CH's claim and that the fundamental nature of CH's claims has not changed. To say this of the Second Tribunal is, to my mind, quite a stretch and with respect to counsel, speculative. No convincing argument or material has been put forward to support this suggestion. I am not persuaded by it. The fact is that at the time of considering and determining the preliminary objections, these additional reliefs had not been disclosed and were not before the Second Tribunal

for its consideration at that point. It may equally be said that in seeking these remedies from the Second Tribunal that the 'second bite at the cherry' argument more aptly describes CH's approach rather than Sonera's.

Interference in this jurisdiction

[60] CH says that the SPA Arbitration is not a direct attack on the integrity of this court's judgment as portrayed by Sonera; that it is no more than an arbitration brought legitimately before a tribunal with unquestionable jurisdiction, pursuant to a Swiss arbitration agreement contained in a Turkish law contract in which personal relief is sought against Sonera. This point, though accepted, does not to my mind take the argument any further. Indeed it is simply the reverse side of the coin in respect of the arguments made by Sonera in respect of the injunctive relief sought here against CH. Both sides rely on the statement of Lord Hobhouse of Woodborough in Turner v Grovit which is recited above in this judgment and with which I agree. A threatened interference is equally capable of being restrained as an operative one.

[61] For the reasons explained above, while I do not consider that an injunction ought to be granted to restrain the Second Arbitration from proceeding without more, I am not at all convinced that CH should be able to seek the remedies which are directly targeted at undermining this court's judgment and orders as expressed in its statement of claim. In short, while I do not consider that CH ought to be restrained from claiming an award equal to Sonera's Final Award, as this course in and of itself may not necessarily be considered as a collateral attack or an interference with this court's jurisdiction, I am unable to regard the additional remedies set out in its statement of claim in the same way. If that is not conduct aimed at direct interference with this court's processes, then I am at a loss as to what course of conduct would so qualify.

The sovereignty principle

[62] It is trite law that the court being asked to grant anti-suit relief will only do so if it is satisfied that it has a sufficient interest in it (or a sufficient connection) with the matter.[54] It is not disputed that the SPA Arbitration is a foreign arbitration with its seat in Switzerland and that it is the Swiss Courts which enjoy supervisory jurisdiction over the Second Tribunal. CH says that there is unchallenged expert evidence that the Swiss courts regard anti-arbitration injunctions as contrary to public policy – they will not grant them. Neither will they recognise or give effect to them if granted by any other court. Accordingly, CH says that the grant of injunctive relief by this court to Sonera would be contrary to comity.

[63] CH makes the additional point that this court is an enforcing court under the Convention. Thus its role is limited to enforcement and does not extend beyond that; and it may not impose its views on enforceability on the whole world, as different enforcement courts and tribunals are free to come to different views on enforceability. With these statements I agree. CH relies on the decision of the US Court of Appeals (5th Circuit) in Karaha Bodas Co. v Negara.[55] In that case, a Swiss arbitration award was made enforceable in the US. Negara (the losing party) then brought proceedings in Indonesia for the annulment of the award. Karaha Bodas Co. ("KBC") applied in the US for an anti-suit injunction aimed at stopping Negara from proceeding with its application in Indonesia. The injunction was granted at first instance but was reversed on appeal. It is worth reciting a few passages from the Court of Appeals decision in relation to the role of an enforcing court under the Convention:

> "[A]s a court of secondary jurisdiction under the New York Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it."[56]

[54] See: Airbus Industrie GIE v Patel and Others [1999] 1 AC 119 per Lord Goff of Chieveley at 138G-H.
[55] 335 F.3d 357 (2003)
[56] At p. 369.

> "[T]he 'relitigation' of issues is characteristic of the Convention's confirmation and enforcement scheme. … [T]he district court's 'final judgment' is not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions …."[57]
>
> "[P]erhaps most importantly, allowing such an injunction to stand could set an undesirable precedent under the Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that **party's attempt to** challenge an award in another country. It is at least conceivable that by using the district court's decision as persuasive authority, an enforcement court in a future dispute might attempt to enjoin proceedings in countries with arguable primary jurisdiction, or in countries with clear primary jurisdiction but with which the enforcement country's court radically disagrees. Reaching out to enjoin proceedings abroad cuts against the Convention's grants of separate and limited roles of primary-jurisdiction courts to annul awards, and of secondary-jurisdiction courts to enforce, or refuse to enforce, awards in their own countries. … In sum, an injunction here is likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign nations and to demonstrate an assertion of authority not contemplated by the New York Convention."[58] (emphasis added).

[64] CH emphasises that in this case the SPA Arbitration is an arbitration arising pursuant to an arbitration agreement governed by Swiss law with its seat in Switzerland, between Turkish and Dutch parties, is pending before a tribunal the jurisdiction of which is accepted by both parties; that it relates to a Turkish law contract whose subject matter is the potential sale of shares in a Turkish company, certain Swiss arbitral awards and claims for personal relief against the Dutch Party and that there is no potential connection with this jurisdiction other than as a potential enforcing court. CH says that an injunction aimed at stopping or controlling foreign arbitral proceedings in these circumstances would be contrary to the entire scheme of the New York Convention and would be usurping the role of the arbitral tribunal as well as the role of the supervisory court which have the exclusive right to control the arbitral proceedings in accordance with their domestic law and arrogating for itself whether the fruits of the arbitration should be recognisable or enforceable in any jurisdiction.

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[57] At p. 372.
[58] At p. 373.

[65] Sonera says, in reliance on Turner v Grovit, that it seeks only to protect this court's jurisdiction to enforce Convention awards and is thus seeking to protect the Convention. Sonera says further that an anti-arbitration injunction is compatible with the New York Convention where (as here), its purpose is to protect the enforcement of a Convention award in a jurisdiction in which the Convention has the force of law and posits that it is CH's anti-enforcement injunction which it seeks against Sonera in the SPA Arbitration which is incompatible with the New York Convention (contrary to CH's own contention that such injunctions are anathema to Swiss law) as CH is seeking to restrain Sonera from enforcing a Convention Award in a jurisdiction where the enforcing court has already considered and conclusively rejected any suggested defences that might have arisen under the Convention.

[66] Sonera also relies on the US Court of Appeals' (Second Circuit) decision made in 2007 in respect of the KBC and "Pertamina"[59] litigation, Karaha Bodas Company v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,[60] ("the Pertamina case") in relation to the same Swiss arbitral Award with which it says Sonera's approach bears close analogy. In the Pertamina case, the US Court of Appeals considered the circumstances in which a federal court may enjoin foreign proceedings that threaten to undermine federal judgments confirming and enforcing a foreign arbitral award. The Court affirmed the decision of the Southern District Court of New York enjoining Pertamina from pursuing a suit in the Cayman Islands that sought to vitiate the arbitral award and obtain a refund of the sums paid out pursuant to it. The Court of Appeals, in dismissing Pertamina's appeal opined:

> "We agree with the Fifth Circuit that federal courts should not attempt to protect a party seeking enforcement of an award under the New York Convention 'from *all* the legal hardships' associated with foreign litigation over the award. But it does not follow … that a federal court cannot protect a party who is the beneficiary of a federal judgment enforcing a foreign arbitral award from *any* of the legal hardships that a party seeking

[59] This was the manner in which the energy company "Negara" had been referred to by the court in Karaha Bodas Co. v Negara 335 F.3d 357 (2003).
[60] 500 F.3d 111 (2007).

> to evade enforcement of that judgment might seek to impose. Federal courts in which enforcement of a foreign arbitral award is sought cannot dictate to other 'secondary' jurisdictions under the New York Convention whether the award should be confirmed or enforced in those jurisdictions … But federal courts *do* have inherent power to protect *their own* judgments from being undermined or vitiated by vexatious litigation in other jurisdictions."[61]

The Court of Appeals made plain that the Cayman Islands, (as a secondary jurisdiction under the Convention had no power to modify or annul the Award and that they [the federal courts] had power to prevent Pertamina 'from engaging in litigation that would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards.'[62] The Court further opined[63] that '"[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce … agreement[s]" to submit disputes to binding international arbitration. … These considerations also require us to protect the regime established by the Convention for the enforcement of international arbitral awards, if necessary by enjoining parties from engaging in foreign litigation that would undermine it.'

Sonera submits that CH in many respects is seeking to engage the same approach as Pertamina as CH's purpose in pursuing the SPA Arbitration is to evade enforcement of a Final Award which is already the subject of the Court's Enforcement Judgment which is also final.

Discussion

[67] As stated earlier there is nothing about the circumstances of this case that may be described as 'run-of-the-mill'. In this case, Sonera and CH are parties subject to a Final Award made in the First Arbitration pursuant to the arbitration agreement contained in the Letter Agreement. The Final Award in Sonera's favour is final and

[61] At pp. 123-124.
[62] At p. 125.
[63] At p. 125.

binding on CH and is unimpeachable. Sonera came to this jurisdiction and sought enforcement of the Final Award as a New York Convention Award. All of the New York Convention defences put forward by CH against enforcement failed and failed in the courts up to the highest level in this jurisdiction. The Enforcement Judgment of this Court is therefore final and unimpeachable by CH. Sonera has taken steps in this jurisdiction to enforce the Enforcement Judgment against CH, by way of charging orders over assets of CH in this jurisdiction. CH has commenced, pursuant to the arbitration agreement contained in the SPA, the Second Arbitration seeking in essence an award, by way of a repayment to it by Sonera, the sums which it is obliged to pay to Sonera under the Final Award pursuant to the First Arbitration. This is claimed notwithstanding that the courts of this jurisdiction concluded that the Letter Agreement and the SPA were component parts of a single transaction and that the First Tribunal had the jurisdiction to make the Final Award. Be that as it may, the Second Tribunal has ruled on the extent of its jurisdiction in respect of the SPA in making its Partial Award. However, the court is not here concerned with this ruling and I refrain from commenting upon it. That said, it is worth being reminded that the Second Tribunal has no power of review of the First Tribunal's ruling as to the extent of its jurisdiction. They are tribunals on similar footing. This much is accepted by Queen's Counsel MacLean on behalf of CH. Indeed, in answer to the court's concern regarding the possibility of the Second Tribunal arriving at a conclusion directly opposite to that of the First Tribunal and each party taking steps elsewhere to enforce their respective awards Mr. MacLean posited that such a scenario was quite foreseeable under the New York Convention and that two sets of arbitral proceedings (presumably between the same parties on the same issues as here) was quite normal. CH says that Sonera cannot say that the Second Tribunal lacks jurisdiction as it has accepted that it does and says that Sonera should be content to rely on its defence in the Second Arbitration.

[68] I must say that I find the idea of two tribunals with diametrically opposed awards in respect of the same parties on the same issues quite troubling as to my mind such

an approach runs counter to the objective of promoting certainty and finality in respect of international commercial disputes. Such an objective must surely be one of the tenets embodied in the whole idea of a party's ability to resolve international commercial disputes by arbitration. A process which should be swifter and more ideally suited for the resolution of disputes arising under commercial contracts. If the result may be as CH suggests here, then it raises the question as to how or when does it end. I must however also remind myself of the fact that Sonera agreed under the SPA to arbitrate. As the learned judge opined (in my view rightly) at paragraph 33 of his judgment, the court is not here concerned with the integrity of any award.

[69] As I observed earlier, whereas I do not consider that it is the place of this Court to enjoin CH from dragging Sonera through the rigors and attendant hardships of the second arbitration pursuant to the SPA and from seeking an award equal to the Final Award[64], it does not follow that the court must stand by and allow CH to seek from the Second Tribunal orders designed directly to undermine or nullify this court's Enforcement Judgment and orders which are themselves based on a Final Award under the Convention. An enforcing court must also be concerned to ensure that the regime established by the New York Convention for enforcing Convention arbitral awards is protected and, if need be, enjoin a party who, by engaging in a foreign process, seeks to undermine it. It is this conduct by CH which I consider to be a step much too far in the SPA Arbitration. Adopting the principles enunciated in the decisions of Turner v Grovit, and Masri, I can see no good reason for refraining from exercising the jurisdiction to enjoin CH from pursuing the relief in the SPA Arbitration aimed specifically at undermining the court's Enforcement Judgment and its other enforcement orders. This is not an assessment or review of the Second Tribunal as it relates to its jurisdiction or, in my judgment, a conclusion disrespectful of it. To the contrary, in so enjoining CH the court is merely acting to protect its own jurisdiction and processes from

[64] No opinion is expressed as to CH's chances of success were enforcement of the Second Tribunal's award sought in this jurisdiction.

conduct by one party which if pursued would clearly be abusive of it and of its role as an enforcement court under the Convention. It does so by having regard to the same considerations which require protection of 'the regime established by the Convention for the enforcement of international arbitral awards, if necessary by enjoining parties from engaging in foreign litigation that would undermine it.'

[70] To the extent that the SPA Arbitration may not annul or vary the Final Award which is now unimpeachable in every respect, the SPA Arbitration can only be considered as analogous to foreign proceedings in which CH is seeking, by the additional reliefs claimed, to undermine the court's Enforcement Judgment and orders. In such a case the court is duty bound, quite apart from its statutory jurisdiction, under its inherent jurisdiction to step in, in order to protect its process from abuse even if the course of conduct engaged is via the avenue of arbitration. Whereas the Act is designed to ensure that the court does not interfere in disputes which the parties have agreed to arbitrate, it does not follow that the court is shut out from restraining a party from pursuing a course in arbitral proceedings which in and of itself seeks to undermine the court's processes in performing its role as an enforcement court pursuant to the very arbitral process engaged by the parties following lawful and recognised processes for enforcement of an arbitral award under the New York Convention.

Conclusion

[71] For the foregoing reasons, I would refrain from restraining CH from pursuing the SPA Arbitration proceedings in and of itself. I am however of the firm view that the reliefs sought at paragraphs 5 and 6 of the 'Prayer for Relief' in CH's statement of claim amounts to a direct attack on the court's processes, judgments and orders in this jurisdiction. The pursuit of such a course by CH specifically aimed as it is at interfering with the court's judgment and orders ought not to be permitted. The court is duty bound to step in so as to protect its processes and judgments. This has nothing to do with the jurisdiction of the foreign arbitral tribunal. To this extent I would allow the appeal. I would accordingly order that CH be restrained from

pursuing before the Second Tribunal the said reliefs aimed at undermining this court's process. I would therefore order that CH be restrained from causing or seeking to cause the Second Tribunal from granting any relief which would have the effect (or the potential effect) of:

(i) preventing Sonera from enforcing the following orders of the court below:
    (a) the Enforcement Judgment, being the judgment issued on 24th October 2011 enforcing the Final Award as a judgment of the court;
    (b) The Final Charging Order of the court below issued on 4th November, 2014 ("the BVI Court Orders"); and
(ii) requiring Sonera to discharge, reverse or unwind the BVI Court Orders.

[72] Finally, I am grateful to counsel on both sides for their helpful submissions, both written and oral. The delay in rendering this decision is deeply regretted. This was due to an exceedingly heavy appellate work schedule further exacerbated by intervening and unforeseen personal circumstances beyond my control.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Joyce Kentish Egan, QC
Justice of Appeal [Ag.]